Koek Tiang Kung v Antara Bumi Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2057 OF 2004

ABDUL MALIK ISHAK J

8 APRIL 2005

Contract — Specific Performance — Sale and purchase of property — Agreement for sale of penthouse unit — Specific performance of delivery of vacant possession — Plaintiff has paid for purchase price — Whether a proper case to grant specific performance

Contract — Specific Performance — Damages in lieu of specific performance — Late delivery interest

The plaintiff had entered into a sale and purchase agreement with the first defendant for the purchase of a penthouse for the purchase price of RM2.2 million. The plaintiff paid and settled the purchase price to the first defendant. Pursuant to Article V of the sale and purchase agreement, the obligation fell on the first defendant to deliver vacant possession of the penthouse to the plaintiff upon full payment of the purchase price. Failing which the first defendant shall pay to the plaintiff liquidated damages at the rate of 10% per annum on the purchase price from the date of default to the date of compliance. This was an application by the plaintiff for specific performance of the sale and purchase agreement, vacant possession of the penthouse and liquidated damages.

Held:

The plaintiff had performed his part of the bargain. The purchase price had been paid in full by the plaintiff and he was entitled to specific performance of the sale and purchase agreement. The first defendant must deliver vacant possession of the penthouse to the plaintiff within 10 days from the date of the service of the order of the court. The first defendant must also pay the liquidated damages on the purchase price at the rate of 10% per annum until the delivery of vacant possession of the penthouse bearing in mind that under s 19 of the Specific Relief Act 1950 liquidation of damages is not a bar to specific performance. The first defendant must, in addition, pay the interest at the rate of 8% per annum of the purchase price from the delivery of vacant possession to the date of full payment. The rate of interest at 8% per annum is in compliance with O 42 r 12 of the Rules of the High Court 1980 (see para 21).

[**Bahasa Malaysia summary**

Plaintif telah memasuki satu perjanjian jual beli dengan defendan pertama untuk membeli sebuah 'penthouse' pada harga belian sebanyak RM2.2 juta.

Plaintif telah membayar dan menyelesaikan harga belian itu kepada defendan. Menurut Perkara V perjanjian jual beli itu, defendan mempunyai tanggungjawab untuk membuat penyerahan milikan kosong kepada plaintif pada penyelesaian pembayaran harga belian. Sekiranya tidak, defendan pertama dikehendaki membayar kepada plaintif ganti rugi jumlah tertentu pada kadar 10% setahun atas harga belian bermula dari tarikh mungkir hingga tarikh patuh. Ini merupakan permohonan oleh plaintif untuk pelaksanaan spesifik perjanjian jual beli, penyerahan hak milikan kosong 'penthouse' dan ganti rugi jumlah tertentu.

Diputuskan:

Plaintif telah melaksanakan tanggungjawabnya berkenaan dengan perjanjian itu. Harga belian telah dibayar dengan penuh dan plaintif berhak kepada pelaksanaan spesifik atas perjanjian jual beli. Defendan pertama mesti menyerahkan hak milikan kosong 'penthouse' kepada plaintif dalam masa 10 hari dari tarikh penyerahan perintah mahkamah. Defendan pertama juga mesti membayar ganti rugi jumlah tertentu pada kadar 10% setahun atas harga belian sehingga penyerahan hak milikan kosong 'penthouse' sambil tidak melupakan bahawa di bawah s 19 Akta Relief Spesifik 1950 ganti rugi jumlah tertentu tidak menghalang pelaksanaan spesifik. Tambahan kepada itu, defendan pertama mesti membayar faedah pada kadar 8% setahun menurut A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 21).]

Notes

For a case on damages in lieu of specific performance, see (2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4489.

For cases on sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4525–4526.

Cases referred to

Chappell v Times Newspapers Ltd [1975] 1 WLR 482 (refd)
Chin Tai v Siow Shiow & Ors [1971] 1 MLJ 67 (refd)
Chong Hoong & Anor v Wong Yuen Sang [1976] 1 MLJ 282 (refd)
Denne v Light (1857) 8 De GM & G 774 (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290 (refd)
Hassan v Ismail [1970] 1 MLJ 210 (refd)
Lamare v Dixon (1873) LR 6 HL 414 (refd)
Lazard Brothers & Co Ltd v Fairfield Properties Co (Mayfair) Ltd (1977) 121 SJ 793 (refd)
Lee Boon Tatt & Ors v Takhdir Trading Sdn Bhd [1984] 2 MLJ 341
Loo Choo Teng & Anor v Check Swee Lee & Ors and another appeal [2000] 2 MLJ257 (refd)
Milward v Earl of Thanet (1801) 5 Ves 720 (refd)
MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ211 (refd)
Pembinaan Masyuli Sdn Bhd v Mow Seng Housing & Land Development Sdn Bhd [1998] 1 MLJ 601
Quadrant Visual Communications Ltd v Hutchison Telephone UK [1993] BCLC 442 (refd)
Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd [1989] 2 MLJ 155 (refd)
Stickney v Keeble [1915] AC 386 (refd)
Walters v Morgan (1861) 3 De GF & J 718 (refd)
Yew Leek Enterprise Sdn Bhd v Foong Engineering & Constructions Works Sdn Bhd [1990] 2 MLJ 62
Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92 (refd)

Legislation referred to

Rules of the High Court 1980 O 42 r 12
Specific Relief Act 1950 ss 11, 19, 21(1)

See Sui Ling (SK Lim, Wong & Yap) for the plaintiff.
First defendant absent and unrepresented.

Abdul Malik Ishak J:

FACTS OF THE CASE

[1] The plaintiff had entered into a sale and purchase agreement dated 5 July 2002 with the first defendant — referring to Antara Bumi Sdn Bhd (Company No 196774–V)), for the purchase of a penthouse known as Unit No 11–13–9 at Menara Antara Condominium at No 11, Jalan Bukit Ceylon 50200 Kuala Lumpur (hereinafter referred to as the 'penthouse') for the purchase price of RM2.2 million. The penthouse was purchased subject to an existing tenancy agreement dated 30 March 2001 between the first defendant and the tenant by the name of Ian D Collins for a period of two years and that tenancy agreement had since expired on 6 April 2003.

[2] By virtue of cll 1.0 and 2.0 of the sale and purchase agreement, the full payment towards the purchase price of the penthouse shall be paid in the following manner:

(a) upon execution of the sale and purchase agreement, a deposit of RM220,000 has to be paid;

(b) within seven (7) days from the date of the sale and purchase agreement and that would be on 14 July 2002, a sum of RM 1,780,000 has to be paid; and

(c) within five (5) calendar months from the date of the sale and purchase agreement and that would be on 5 December 2002, the final balance of the sale and purchase amounting to RM200,000 has to be paid.

[3] Dutifully the plaintiff paid and settled the purchase price to the first defendant in the following manner:

(i) by way of deposit, payment in the sum of RM220,000 was effected on 4 July 2002 by way of a cheque from EON Bank Berhad vide cheque No 772782;

(ii) the sum of RM1,780,000 was paid on 8 July 2002 vide EON Bank Berhad cheque No 772783; and

(iii) the final balance of the purchase price in the sum of RM200,000 that was scheduled to be paid on 5 December 2002 was extended to 31 May 2003 and this was finally paid by the plaintiff.

[4] Now, pursuant to Article V of the sale and purchase agreement, the obligation falls on the first defendant to deliver vacant possession of the penthouse to the plaintiff upon full payment of the purchase price. Failing which the first defendant shall pay to the plaintiff liquidated damages at the rate of 10% per annum on the purchase price from the date of default to the date of compliance. Sometime on or about 26 February 2003, the plaintiff through his solicitors wrote to the first defendant in regard to the status of the tenancy agreement which was expiring on 6 April 2003 but the first defendant refused to respond. Again on 16 May 2003 and 28 January 2004, the plaintiff through his solicitors wrote to the first defendant pertaining to the delivery of vacant possession of the penthouse but the first defendant refused to reply. It is certainly obvious that the first defendant has breached its obligation in complying with the sale and purchase agreement. It is the stand of the plaintiff that he is always ready, willing and able to perform his part of the bargain under the sale and purchase agreement. Events have shown that the plaintiff has indeed fulfilled his part of the bargain.

THE ORIGINATING SUMMONS IN ENCLOSURE 1

[5] The plaintiff filed encl 1 and sought for the following orders:

(a) specific performance of the sale and purchase agreement of the penthouse;

(b) vacant possession be given to the plaintiff within ten (10) days from the date of the service of the court order;

(c) that the defendants to pay the liquidated damages at the rate of 10% per annum on the sum of RM2,200,000 calculated from 10 April 2003 until vacant possession of the penthouse;

(d) interest at the rate of 8% per annum on item (c) as stated above from the date of the delivery of vacant possession to the date of full payment;

(e) by way of an alternative, the plaintiff claimed from the defendants the return of RM2,200,000 and liquidated damages in the sum of RM200,000;

(f) interest at the rate of 8% per annum on item (d) as stated above from the date of service of the order to the date of full payment;

(g) costs of the action based on solicitor client; and

(h) any other relief which the court thinks fit.

[6] The learned counsel for the plaintiff was quite magnanimous. He withdrew prayers (e) and (f) of encl 1 and I accordingly struck them out as against the first defendant. The rest of the prayers remained intact.

[7] During the hearing of encl 1, both the defendants were absent. They were duly served with the cause papers.

SERVICE OF THE CAUSE PAPERS ON THE FIRST DEFENDANT

[8] The cause papers in encl 1, 2, 4 and 5 were served based on the addresses of the first defendant as reflected in the search conducted at the Companies Commission of Malaysia.

[9] As I said, encl 1 is the originating summons and it is supported by an affidavit affirmed by the plaintiff himself on 20 September 2004 as seen in encl 2. The notice of appointment dated 18 January 2005 for the originating summons can be seen in encl 4. While the notice of non-appearance dated 3 February 2005 can be seen in encl 5. Then there is the affidavit of service affirmed by Mohd Haniff bin Yusoff on 7 January 2005 as seen in encl 3 and another affidavit of service affirmed by the same gentleman on 22 March 2005 can be seen in encl 6.

[10] Exhibits 'MH–3' and 'MH–4' of encl 3 would show the service of encls one (1) and 2 on the first defendant at the following place and time:

(a) at the business address which would be at suite 14.3, 14th Floor, MCB Plaza, Changkat Raja Chulan, Kuala Lumpur by way of personal service on 10 November 2004; and

(b) at the registered address which would be at No 62C, Jalan Maharajalela, Kuala Lumpur by way of registered post on 22 November 2004.

[11] While exh 'MH–2' and exh 'MH–3' of encl 6 would categorically show the service of encls 4 and 5 on the first defendant at the following place and time:

(a) at the business address as stated above by way of registered post on 28 February 2005; and

(b) at the registered address as stated above by way of personal service on 1 March 2005.

[12] Such service must be construed as good service. It must be borne in mind that every company must have a registered office within Malaysia. And that registered office must be open and accessible to the public for not less than three hours during ordinary business hours on each day, with Saturdays or Thursdays as the case may be, weekly and public holidays excepted (see s 119(1) of the Companies Act 1965). And by virtue of the same section of the same Act, the company must have a registered office within Malaysia to which all communications and notices may be addressed. Of pertinence is this, that the Registrar of Companies must be notified of the address of the registered office, the days and hours during which it is open and accessible to the public and of any change therein within one month of the incorporation of the company or, such change as the case may be. However, no such notice is required if the office is open for at least five hours during ordinary business hours on each day, with Saturdays, weekly and public holidays excepted. According to Yong Fung How J in Re Shangri-la Cruise Pte Ltd (1991) 1 MLJ 22 at 24, it is of importance that the notice of the change of registered office is lodged with the Registrar of Companies. Thus, a company that has changed its registered office without notifying the Registrar of Companies as required under the Companies Act 1965 cannot rely upon the change to defeat service which has been properly effected at its former registered office particularly when the fact of the change is not known to the plaintiff or the petitioner at the time of service (*MUI Bank Bhd v Golden Hornbill Hotel Sdn B*hd [1993] 1 MLJ 290). The court in *Lee Boon Tatt & Ors v Takhdir Trading Sdn. Bhd* [1984] 2 MLJ 341 at 342, was of the view that it was not the legislative intention to limit service only to the registered office and that where the rule provides for service at the principal office it should mean just that - at the principal place of business of the corporation. And this is so even though the principal office is not the registered office (*Yew Leek Enterprise Sdn Bhd v Foong Engineering & Constructions Works Sdn Bhd* [1990] 2 MLJ 62). Even the Court of Appeal in *Pembinaan Masyuli Sdn Bhd v Mow Seng Housing & Land Development Sdn Bhd* [1998] 1 MLJ 601 was of the view that service at the sales office used as another principal place of business instead of at the registered office is effective. There, the fact that a board meeting was held at the sales office reinforced the view that the premises was another of the company's principal offices used for the conduct of its business.

[13] Here, service of the documents were effected on the business address and the registered address of the first defendant. In law, such service constitutes good service.

SPECIFIC PERFORMANCE

[14] The plaintiff seeks specific performance of the sale and purchase agreement dated 5 July 2002 for the purchase of the penthouse because damages is not an adequate relief. It is ideal to refer to the judgment of Lee

Hun Hoe CJ (Sabah and Sarawak) in the case of *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 in adjudicating encl one (1). There his Lordship aptly laid down the law in these salient words (see pp 156–157 of the report):

> By summons in chambers dated 4 August 1986 the plaintiff applied pursuant to O 81 of the Rules of the High Court 1980 for specific performance. The learned judge made the order on 15 April 1987. At the request of the defendant the learned judge heard further argument. On 26 October 1987 he confirmed the decision he made earlier in ordering specific performance of the contract. Hence the present appeal.
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> In *Sale and Purchase of Real Property* Professor Visu Sinnadurai observes that specific performance is a discretionary remedy and over the years the courts have spelt out the circumstances under which the relief may not be granted. These equitable principles are reflected in ss 20 and 21 of the Specific Relief Act. Section 20(1)(a) provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money. As Professor Sinnadurai correctly pointed out at p 436 this provision has to be read with some reservation in dealing with contracts for the sale and purchase of property. Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s 20(1)(a) is of general application while s 11(2) deals specifically with contracts for the sale of land. It is therefore right that s 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. He concluded his observation thus:
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> > .... The effect of these two sections is that it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the defendant is a heavy one and he fails to satisfy the court of the adequacy of damages, the court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.
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> Under s 21(2)(b) the courts may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee. Each case must be decided on its particular facts. In *RM Venkatachalam Chettiar & Ors v NKR Arunasalam Chettiar* [1953] MLJ 234 Thomson J as he then was, held that no great hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37 specific performance was granted. The court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel & Anor v Ali & Anor* [1984] 1 All ER 978 was successful in her appeal against an order of specific performance on ground of hardship. There was in that case a period of more than four years' delay and it would be just to leave plaintiffs to their remedy in damages. In *Johnson & Anor v Agnew* [1979] 1 All ER 883 the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to

discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the court.

Finally, the New Zealand case of *Nicholas v Ingram* [1958] NZLR 972 where the defence was based solely on financial inability to complete. We refer to the headnotes. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

The plaintiff does not agree with the defendant's interpretation of cl 8. The vendor has a choice either to get specific performance or to get liquidated damages. Even before the full purchase price was paid the vendor gave possession of land to the purchaser who acted as if the land was his by demolishing all the buildings on the land in preparation for development.

In *Specific Performance* by Gareth Jones and William Goodhart QC under the heading 'Specific Performance Will Be Denied If Damages Are An Adequate Remedy' at p 20 it is stated that:

> The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that the parties have agreed that damages are an adequate remedy or that one party has an option to pay or perform, specific performance will nonetheless be granted if it is the appropriate remedy...

This point was made clear by the Privy Council in the case of *Zaibun Sa bte Syed Ahmad v Loh Koon May & Anor* [1982] 2 MLJ 92. There the respondents sought specific performance of contract for the sale of land against the appellant. The learned judge decided in favour of the respondents but found that there was an oral agreement enabling the respondents to pay damages for breach. He therefore gave damages in favour of the respondents who appealed to the Federal Court seeking specific performance of the contract. The Federal Court held that the respondents were entitled to specific performance. In dismissing the appeal the Privy Council held, *inter alia*, that the fact that there was an alternative claim for damages, in an action by the purchaser for specific performance of a contract for the sale of land, could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance. As Lord Russell of Killowen in delivering the judgment of the Board at p 94 questioned the refusal of the learned judge to grant specific performance just because the learned judge thought a stun was fixed in consideration of the purchase. He observed:

... If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s 19 of the Specific Relief Act, the terms of which are as follows:

A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

The defendant submitted that the law was covered by the Specific Relief Act 1950. Section 11(1) makes clear that specific performance may be enforced at the discretion of the court. It is to be granted only when pecuniary compensation is not an adequate remedy.

[15] I gratefully adopt what his Lordship has said in that case to the facts of the present case. In Malaysia, the law governing specific performance is found in the Specific Relief Act 1950. In the context of the present case, s 11 of the Specific Relief Act 1950 plays a prominent role. It provides that specific performance may be granted in respect of agreements relating to land transactions (including the present case where it involves the purchase of the penthouse) where there is a presumption that a breach of the contract to transfer immovable property cannot be adequately relieved by way of monetary compensation (*Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92). Then there is s 19 of the Specific Relief Act 1950 which enacts that liquidation of damages is not a bar to specific performance.

[16] It is ideal to remember that under s 21(1) of the Specific Relief Act 1950, it is entirely at the discretion of the court to grant specific performance. Such discretion must not be arbitrarily exercised but rather it must be exercised in accordance to the 'fixed rules and principles' (*Lamare v Dixon* (1873) LR 6 HL 414 at p 423). In *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290, Sean FCJ speaking for the Federal Court observed at p 297 that 'the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, the conduct of the parties and their respective interests under the contract, are to be remembered'.

[17] It is a correct assertion to make that it is not a matter of right for the person seeking relief to automatically obtain an order for specific performance. It is not a matter of right to obtain specific performance. It cannot be asked for as of right. It is entirely a matter of discretion on the part of the court. In the words of Lord Parker in *Stickney v Keeble* [1915] AC 386 at 419:

Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do.

[18] Certain factors may affect the court's discretion in granting specific performance:

(1) whether there has been a delay in seeking for specific performance? (*Milward v Earl of Thanet* (1801) 5 Ves 720; *Lazard Brothers & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* [1977] 121 SJ 793);

(2) whether the person seeking specific performance is himself prepared to perform his side of the contract? (*Chappell v Times Newspapers Ltd* [1975] 1 WLR 482);

(3) whether the person against whom the relief of specific performance is being sought would suffer substantial hardship? (*Denne v Light* (1857) 8 De GM & G 774 — this was a case where specific performance was refused of a contract for the sale of a piece of land. After signing the contract, the purchaser refused to continue with the purchase because he discovered that the land in question was 'landlocked' and the vendor refused to guarantee that he would have a right of way over any of the surrounding land); and

(4) whether the contract had been obtained by unfair means? (*Walters v Morgan* (1861) 3 De GF & J 718).

[19] These are some of the factors and they are not exhaustive at all. Of pertinence to note would be this. That the parties cannot fetter the courts' discretion in their contract (*Quadrant Visual Communications Ltd v Hutchison Telephone UK* [1993] BCLC 442).

[20] On the brighter side, the courts have in the past granted specific performance involving land transactions but subject to a condition precedent to be performed by the vendor. It is not out of place to mention these cases in quick succession:

(1) *Chong Hoong & Anor v Wong Yuen Sang* [1976] 1 MLJ 282 (HC);

(2) *Chin Tai v Siow Shiow & Ors* [1971] 1 MLJ 67 (FC);

(3) *Hassan v Ismail* [1970] 1 MLJ 210 (FC);

(4) *Loo Choo Teng & Anor v Check Swee Lee & Ors and another appeal* [2000] 2 MLJ 257 (CA); and

(5) *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (FC).

[21] Here, the plaintiff has performed his part of the bargain. The contract sum has been paid in full by the plaintiff and he is entitled to specific performance of the sale and purchase agreement. The first defendant must deliver vacant possession of the penthouse to the plaintiff within 10 days from the date of the service of this court order. The first defendant too must pay the liquidated damages on the purchase price at the rate of 10% per annum from 10 April 2003 till the delivery of vacant possession of the penthouse bearing in mind that under s 19 of the Specific Relief Act 1950 liquidation of damages is not a bar to specific performance. The first defendant too must pay the interest at the rate of 8% per annum of the purchase price from the delivery of vacant possession to the date of full payment. The rate of interest at 8% per annum is in compliance with O 42 r 12 of the Rules of the High Court 1980.

[22] For the reasons as adumbrated above, I granted prayers (a), (b), (c), (d) and (g) of encl one (1) as against the first defendant. I then fixed the date of hearing of enclosure one (1) as against the second defendant on 5 May 2005.

Order accordingly.

Reported by Peter Ling